

2014 WL 4380775 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Israel SWAREY, ET ux., Appellants,
v.
Kerry STEPHENSON, et al., Appellees.

No. 1272.
September Term, 2013.
May 2, 2014.

On Appeal from the Circuit Court for St. Mary's County (Hon. David W. Densford, Judge)

Brief for Appellee Kerry Stephenson

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*1 STATEMENT OF THE CASE

On May 18, 2011, Plaintiffs Israel and Linda Swarey, now Appellants (“Appellants”), filed their Complaint - Action Involving Real Property (“Complaint”) in the Circuit Court for St. Mary's County, Maryland. (E019) Defendant Stephenson, now Appellee (“Appellee Stephenson”), was never properly served with Appellants' Circuit Court Complaint. Defendants Todd Parriott and Phillip Parriott, now Appellees (“Appellees Parriotts”), were successfully served with the Circuit Court Complaint. Defendant Nicholas Andrews, Defendant N. Andrews LLC, and Defendant Sean Zausner were not properly served with Appellants' Circuit

Court Complaint and Summons and Appellants were not able to obtain service of process of Defendant David Zausner and Defendant David Feingold. Prior to Stephenson ever being properly served, the Parriotts filed, on December 15, 2011, a Notice of Removal to the United States District Court. (E071) This automatically stayed the Circuit Court action before the Circuit Court for St. Mary's County, Maryland.

On October 24, 2011 and prior to removing the case to Federal Court, Defendant Desert Capital REIT, Inc. filed a Notice of Automatic Stay issued in re: Desert Capital REIT, Inc., in the United States Bankruptcy Court for the District of Nevada, Case No. 11-16624-LBR. This Notice has not been lifted to date.

On December 20, 2011, Defendant Stephenson was properly served with a Federal Complaint that had been filed in the United States District Court for the District of Maryland, Southern Division in Case No. 11-CV-3615 DKC. On February 1, 2012, Stephenson filed an Answer to the Complaint in the United States District Court. (E077). *2 On February 29, 2012, Stephenson filed an Amended Answer to the Complaint in the United States District Court. (E111).

The case remained in the United States District Court until Judge Deborah K. Chasanow issued an order on September 20, 2012 remanding the case to the Circuit Court for St. Mary's County. (E193). In Federal Court, Appellees Parriotts filed a motion to dismiss based upon lack of personal jurisdiction and subject matter jurisdiction. In summary, Judge Chasanow ruled that Appellants had personal jurisdiction over Appellees based upon a Federal Statute known as RICO. (E148). Judge Chasanow also ruled that venue was proper in the U.S. District Court for Maryland. (E148). The Third issue raised by Appellees Parriotts was that the case should be dismissed for Appellants' failure to state a claim under the RICO statute. Judge Chasanow agreed with this argument and dismissed the RICO claim as to all Defendants; consequently, the only claims remaining were all state law claims and Judge Chasanow refused to exercise supplemental subject matter jurisdiction and instead elected to remand the case to the Circuit Court for St. Mary's County, Maryland. (E148). In reaching this decision, Judge Chasanow found that "because the RICO count will be dismissed, there will no longer be a basis for exercising pendant personal jurisdiction over the Parriott Defendants as to the state law claims, necessitating an analysis of personal jurisdiction under Maryland's long-arm statute." (E190, fn. 14). In respect to Appellee Stephenson, Judge Chasanow found that "even though neither Desert Capital nor Stephenson ha[d] affirmatively sought dismissal at this time, they ha[d] not waived their right to do so." (E187). Judge Chasanow further stated in footnote 12 of her opinion that

*3 Stephenson filed an answer and amended answer to the complaint without moving for dismissal under [Rule 12\(b\)\(6\)](#). Although Stephenson did not specifically assert failure to state a claim upon which relief can be granted as an affirmative defense, he has not waived his right to do so. See [Fed. R. Civ. P. 12\(h\)\(2\)](#) (explaining that the defense of failure to state a claim upon which relief can be granted may be raised as late as trial).

(E187).

Upon remand to the Circuit Court, Appellee Stephenson filed a Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Process, which the Court granted. (E194, E527). Appellees Parriotts also filed Motions to Dismiss for Lack of Personal Jurisdiction, which the Court granted. (E222, E234, E523, E525). In granting Appellee Stephenson's Motion to Dismiss, the Circuit Court found that Maryland state service on Appellee Stephenson was improper and that a State court was not required to accept an Answer filed in Federal Court on remand as valid. (E527). In August 2013, Appellants filed Notice of Appeal. (E529). On September 6, 2013, Appellants filed a Motion for Entry of Final Judgment as to Defendant Todd Parriott, Defendant Phillip Parriott & Defendant Kerry Stephenson to which Appellees Parriotts and Appellees Stephenson responded to on September 24, 2013 and September 25, 2014. To date, the Circuit Court has not entered a final judgment as to any of the named Defendants in this case.

*4 QUESTIONS PRESENTED

I. Whether the Circuit Court was correct in granting Appellee Stephenson's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process

II. Whether an appeal before the Maryland Court of Special Appeals is proper when a final judgment has not been entered against any of the named Defendants in the Circuit Court.

III. Whether this Court would have personal jurisdiction over Appellee Stephenson, an out-of-state defendant who has no contact with Maryland, even if this Court determined that Appellee Stephenson was properly served with a Maryland state Complaint and Summons or that Federal Pleadings are valid in State court upon remand

STATEMENT OF FACTS

Appellee Stephenson is a resident of Nevada and has had no contact with the Appellants in Maryland. Appellants initiated this case in the Circuit Court for St. Mary's County, Maryland. Appellants attempted to serve Appellee Stephenson with a State Circuit Court Complaint and State Circuit Court Summons in August 2011 and in November 2011, but failed to comply with the Maryland Rules and Maryland Courts and Judicial Proceedings Article; therefore, Appellee Stephenson was never properly served in the Circuit Court for St. Mary's County, Maryland. After Appellee Pariotts removed the case to the United States District Court for the District of Maryland, Appellee Stephenson was properly served with a Federal Complaint and Summons. The only time Appellee Stephenson filed an answer was in Federal Court. With the RICO claim dismissed and the vehicle for the U.S. District Court to exercise personal jurisdiction off the table, the U.S. District Court declined to address the remaining state law claims, *5 finding that the proper mechanism for a personal jurisdiction analysis is the Maryland long-arm statute.

Once the case was remanded to State court, Appellees Pariotts and Appellee Stephenson filed Motions to Dismiss. Appellee Stephenson's motion to dismiss was based on lack of personal jurisdiction in the Maryland Circuit Court, improper service of the State Court complaint and summons, and the invalidity of Federal pleadings in State court on remand.

Appellants claim that this Court has jurisdiction over Appellee Stephenson because he purposefully availed himself of Maryland's laws by advertising financial products in Maryland, contracting to provide financial services, financial advice, and retirement planning to Appellants in Maryland, receiving revenue from goods and/or services from within Maryland by collecting money from Appellants, committing a tortious injury to Appellants in Maryland, and making fraudulent misrepresentations and/or omissions to Appellants in Maryland.

However, Appellee Stephenson: (1) does not reside in Maryland; he admits he used to be a resident of Maryland but he moved from Maryland in 1999 and moved to New Jersey. He became a resident of New Jersey and then moved to Nevada in August 2003 and has lived there continuously ever since; (2) has a Nevada driver's license and he is registered to vote in Nevada and he currently, along with his wife, owns a home in Nevada; (3) does not own any real estate in Maryland; (4) does not conduct any type of business in Maryland; (5) has not personally transacted or solicited any business from, or performed any character of work or service for, any individual or entity in Maryland; *6 (6) he has not advertised, furnished, produced, or distributed financial or marketing products and materials in Maryland; (7) has not contracted to provide goods, financial services, financial advice, or retirement planning in Maryland; (8) has not been a party to a contract made in Maryland since he sold his home in Maryland in 1999; (9) has not received substantial revenue from goods and/or services from within Maryland; (10) has not made fraudulent misrepresentations or fraudulent omissions in Maryland as alleged in Appellants' Complaint; (11) has not caused tortious injury in Maryland by any act or omission in Maryland as alleged in Appellants' Complaint; (11) has not caused tortious injury in Maryland or outside of Maryland by any act or omission outside Maryland by regularly transacting or soliciting business, engaging in any other persistent course of conduct in Maryland, or deriving substantial revenue from goods or services in Maryland; (12) does not have an interest in, use, or possesses real or personal property in Maryland; (13) has not contracted to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within Maryland; (14) has never maintained an office or agent for service of process in Maryland; (15) has never maintained a mailing address, post office box, telephone, bank account, or safe deposit box in Maryland since

he moved from Maryland in 1999; (16) has never paid taxes in Maryland since 1999; and (17) has never held any license issued by Maryland since he turned in his driver's license shortly after he moved to New Jersey. (E212).

*7 Further, Appellee Stephenson has never met Appellant Linda Swarey and while he did meet Appellant Israel Swarey, once for approximately one and half hours, this meeting took place in Nevada, not Maryland. (E212).

STANDARD OF REVIEW

Pursuant to [Maryland Rule 8-131\(c\)](#) :

Action tried without a jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

[Md. Rule 8-131\(c\)](#).

“Upon the trial court's grant of a **motion to dismiss**, an appellate court must determine whether the decision was legally correct.” [Md. Rule 2-322\(b\)\(2\)](#). *Porterfield v. Mascari II, Inc.*, 142 Md. App. 134 (2002), *certiorari granted* 369 Md. 179, *affirmed* 374 Md. 402. “Ordinarily, when a trial court purports to grant a **motion to dismiss**, an appellate court reviews that action based solely on the allegations contained within the four corners of the complaint; however, when a trial judge is presented with factual allegations beyond those contained in the complaint to support or oppose a **motion to dismiss** and the trial judge does not exclude such matters, the motion is treated as one for summary judgment, for purposes of determining the standard of review on appeal.” *Nickens v. Mount Vernon Realty Group, LLC*, 429 Md. 53 (2012). “When considering on appellate review the grant of a **motion to dismiss** a complaint for failure to state a claim upon which relief may be granted, a court must assume the truth of, and view in a light *8 most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may be reasonably drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, i.e., the allegations do not state a cause of action for which relief may be granted. “*Bacon v. Arey*, 203 Md.App. 606 (2012), *certiorari denied* 427 Md. 607.

“Under the clearly erroneous standard, the appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party, and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed.” *L. W. Wolfe Enterprises, Inc. v. Maryland National Golf L.P.*, 165 Md.App. 339 (2005), *certiorari denied* 391 Md. 579. The clearly erroneous standard of review, applicable to the judgment of a trial court on the evidence at a bench trial, does not apply to the trial court's determinations of legal questions or conclusions of law based upon findings of fact. *Turner v. Bouchard*, 202 Md.App. 428 (2011).

In this case, Appellee Stephenson is the prevailing party in the Circuit Court for St. Mary's County, Maryland on his Motion to Dismiss. Additionally, the Circuit Court has not entered a judgment against Appellee Stephenson or any other named Defendant.

*9 ARGUMENTS

I. THE CIRCUIT COURT WAS CORRECT IN GRANTING APPELLEE STEPHENSON'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INSUFFICIENT SERVICE OF PROCESS

A. Appellee Stephenson Was Not Properly Served With The Complaint And Maryland State Court Summons

Appellants allege that Appellee Stephenson was properly served with the Maryland State Court Complaint and Summons on two separate occasions. See Appellants' Brief, pg. 9. However, Appellants failed to comply with [Md. Rule 2-121](#) on both occasions; consequently, Appellee was not properly served with the Maryland State Court Complaint and Summons on either occasions.

On August 16, 2011, Appellants attempted service of the Maryland State Court Complaint and Summons via certified mail, return receipt to Appellants address of 2834 Guardi Court, Henderson, NV 59052. Appellants argue that they complied with service requirements of [Maryland Rule 2-121\(a\)\(3\)](#) because Appellant's address was confirmed by a third-party as his primary address. See Appellant's Brief, pg. 10. On November 27, 2011, Appellants utilized the services of Stanley W. McGrue of Same Day Process Service, Inc. of Washington D.C. who served Appellee's wife at his home.

Pursuant to [Maryland Rule 2-121\(a\)](#) :

(a) Generally. Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) **if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, *10 complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery--show to whom, date, address of delivery."** Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

[Md. Rule 2-121](#) (emphasis added).

In a failed attempt to serve Appellee Stephenson, Appellants partially complied with [Md. Rule 2-121\(a\)\(3\)](#) by mailing the Complaint and Summons via certified mail return receipt to Appellee's primary address of 2834 Guardi Court, Henderson, NV 69052. What Appellants failed to do was to send the Complaint and Summons via certified mail *requesting "Restricted Delivery - show to whom, date, address of delivery"* as required by [Md. Rule 2-121 \(a\)\(3\)](#). This noncompliance is evidenced in Appellants' United States Postal Certified Mail receipt. (E504). The Restricted Delivery fee box notes that Appellants paid \$0.00 for Restricted Delivery; therefore, it can be concluded that Restricted Delivery was not used at all. Additionally, Appellants provide no evidence that Appellee Stephenson received or signed for the certified mail. All Appellants accomplished was to attempt to send Appellee Stephenson the Complaint and Summons via certified mail, return receipt. Appellants failed to comply with [Maryland Rule 2-121\(a\)\(3\)](#) because they failed to send the Complaint and Summons via certified mail requesting Restricted Delivery rendering their attempted service on Appellee on August 16, 2011 insufficient.

Appellants' next failed attempt at service was on November 27, 2011. Appellants argue that they complied with [Maryland Rule 2-121\(a\)\(2\)](#) by leaving the State court *11 Complaint and Summons at Appellee Stephenson's home with Appellee Stephenson's wife, Jean Stephenson. Appellants argue that their Writ of Summons was effectively served on Appellee Stephenson's wife on November 27, 2011 by Stanley W. McGrue of Same Day Process Service, Inc. Appellants' affidavit of service is "signed and sworn before" a notary on the "13th day of December, 2011." (E508). This date of notarization conflicts with the date of service as set forth in the Affidavit of Service. (E508). Appellants state their attempt of service was on November 27, 2012, suggesting that the Affidavit of Service was notarized almost an entire year prior to attempted service. Appellants argue that the date of service of November 27, 2012, as noted on the Affidavit of Service, is a mistake and the correct date should be inferred to be November 27, 2011 because the Affidavit of Service was notarized December 13, 2011. See Appellant's Brief, pg. 10. Appellants should not be afforded the luxury of having critical issues inferred by this Court for Appellants' unilateral mistake. Should this Court begin to allow inferences to be made when a party makes a mistake the Maryland Rules would be compromised and legal structure would dissipate, as parties could no longer rely on set standards and rules made by the Court. Parties that diligently comply with the Rules would be penalized for their compliance, while a party acting less than diligent would reap a reward and receive a second bite at the apple. Therefore, because the date of notary and date of service do not line up, Appellant's second attempted service is insufficient, as it does not comply with [Maryland Rule 2-121](#). It is worth noting that if this was a mistake, Appellants could have issued a new Affidavit of Service with the correct date *12 but they have failed to do so. If it truly was a mistake then why they have not done so is a mystery.

B. Maryland State Courts Should Not Give Effect To Federal Summons Upon Remand To State Court.

Appellee Stephenson's answer and amended answer to the Federal complaint should not be effective in the Circuit Court for St. Mary's County Maryland.

It has long been held by the Supreme Court that “[i]t will be for the State court, when the case gets back there, to determine what shall be done with the pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction. [Ayres v. Wiswall](#), 112 U.S. 187, 190-91 (1884). Maryland Rule 2-121 was adopted by the Maryland courts in the exercise of its rulemaking power under [Maryland Constitution art. IV, § 18\(a\)](#) regarding “the practice and procedure in and the administration of the appellate courts and in the other courts of the State” just as [Federal Rule of Civil Procedure 5](#) was promulgated by the U.S. Supreme Court in the exercise of its rulemaking power under the Rules Enabling Act, [28 U.S.C.A. § 2072\(a\)](#) providing that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure... for cases in the United States district courts and courts of appeals.”

Appellants argue that the State court has jurisdiction over Appellee Stephenson because he answered in Federal court. On December 20, 2011, Appellee Stephenson was served with a Complaint that had been filed in the U.S. District Court to which he filed his answer on February 1, 2012 and amended answer on February 29, 2012. Appellee Stephenson answered in Federal court because the U.S. District Court had jurisdiction *13 over him based upon a Federal Statute known as RICO. The U.S. District Court dismissed the RICO claim “because the complaint [did] not allege specific factual events.” (E184). In remanding the case back to State court, Judge Chasanow held that there was no longer a basis to exercise personal jurisdiction as the RICO claim was dismissed. (E190). Judge Chasanow then failed to exercise supplemental subject matter jurisdiction and remanded the case to State court to determine whether personal jurisdiction existed under Maryland's long arm statutes. (E190, fn. 14.). To hold Appellee Stephenson to a complaint that was answered in a different court, which had proper jurisdiction, would be unjust and prejudicial.

Maryland state courts have yet to determine whether pleadings filed in Federal courts are held valid upon remand to State court. Appellants offer cases in other jurisdictions that give pleadings filed in Federal court effect on remand to State court but fail show that these cases are applicable. Appellants also fail to cite the many cases that oppose Appellants' position.

Appellants argue that *Mullane v. Vent. Hanover Bank & Trust Co.* applies to the case at hand and justifies their inability to properly serve Appellee Stephenson. The issue in *Mullane* was whether publication alone, as allowed under [New York Banking Law § 100-c\(12\)](#), was a reliable method to place the many appellants, whose whereabouts were known, on proper notice that they were subject to suit. *Mullane v. Vent. Hanover Bank & Trust Co.*, 339 U.S. 306 (U.S. 1950). In *Mullane*, some of the appellants were served under [New York Banking Law § 100-c\(12\)](#) providing that “after filing such petition (for judicial settlement of its account) the petitioner shall cause to be issued by the court in *14 which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust...” Other appellants were served under [New York Banking Law § 100-c\(9\)](#) by mail. The issue was whether the [New York Banking Law § 100-c\(12\)](#) complied with the requirements of the Fourteenth Amendment affording appellants whose whereabouts were known the due process of the law. The court reasoned that “notice be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance but if with due regard or the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.” *Id.* at 314-15. The court further reasoned that “[t]he criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals,” going on to further state that “any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.” *Id.* at 315-16 (internal citations omitted). The court held that the notice by way of publication was “incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights.” *Id.* at 320.

The case at hand relates to Appellant's inability to properly serve Appellee Stephenson in accordance with [Maryland Rule 2-121\(a\)\(2\)-\(3\)](#) as discussed supra, not whether these rules are compatible with the requirements of the Fourteenth Amendment.

***15** The Maryland Rules regarding service are “reasonably certain to inform those affected” when properly followed.

Appellants also fail to show that *Rajan v. Knapp* is applicable to the case at hand. The issue in *Rajan* was whether the state court had jurisdiction over a defendant who was served with a state summons and filed his answer in state court after the case was removed to Federal court. [Rajan v. Knapp](#), 965 S.W.2d 47, 49 (1st Dist. 1998). After removal, Defendant was not re-served with a Federal summons. *Id.* Subsequently, the federal district judge remanded the case back to State court as it was improperly removed. *Id.* Had Appellee Stephenson been served properly in accordance with the Maryland Rules and answered the State court complaint after removal in State court this case would be more applicable. The case at hand is not one of timing of service, but one of validity of service. The court in *Rajan* held that “the completion of Rajan's service after removal was not defective. The service of the state court citation was sufficient for the federal court to acquire jurisdiction over Rajan even though the federal court did not issue new federal process. *Id.* at 49-50. The court went on to state that “the additional service by the federal district court clerk would add nothing because federal court service may be made pursuant to [Fed. R. Civ. P. 4\(d\)](#) and [\(e\)](#) in the same manner as the service made under [the state rule.]” *Id.* at 50. In *Rajan*, the issue was whether federal court could find jurisdiction over a defendant who answered in state court after the case was removed to federal court. The issue in the case at hand is completely different and one that questions whether the Maryland State court could acquire jurisdiction over Appellee Stephenson who filed an answer in Federal court, but never in State court.

***16** Appellants heavily rely on *State v. Hess Corp.* from the Supreme Court of New Hampshire. In New Hampshire, the decision on whether or not to accept federal pleadings, as if filed in the state court, in a case remanded to the state court, is in the discretion of the trial court. [State v. Hess Corp.](#), 159 N.H. 256, 261 (2009). The Supreme Court of New Hampshire articulated several policy considerations for the state trial court to consider in making the discretionary call as to whether or not to give effect to pleadings, including judicial efficiency and economy, fairness, avoiding forfeiture of claims and resolving them on the merits, and the policy of comity. [Hess Corp.](#), 159 N.H. at 262.

Hess Corp. centered upon the viability in state court of an amended complaint that was filed in federal court after remand to state court, but the procedural history was much more complicated and drawn out than in the case at bar. In *Hess Corp.*, litigation was initiated in state court, removed to federal court, then transferred to another federal district after several judges recused themselves, then transferred to yet another federal district after the case became part of a multidistrict case, then the case went to the Federal Second Circuit Court of Appeals for an interlocutory review of a district court decision, and was then remanded to state court. *Id.* at 258-59. *Hess Corp.* is a poster child for accepting federal pleadings in state court in the interest of judicial efficiency, since the case was drawn out through many different courts and presumably over a long period of time.

In the case at bar, such a complicated procedural history is not present. The Appellants' complaint was filed in the Maryland Circuit Court. Appellee Stephenson did ***17** not answer. Another Appellee moved for removal to the U.S. District Court. Appellee Stephenson, served with a federal summons and complaint, answered in the U.S. District Court pursuant to the Federal Rules of Civil Procedure. Within a year, the case was remanded back to the Maryland Circuit Court, after the U.S. District Court found that it had jurisdiction over the RICO claim, dismissed that claim, and declined to exercise jurisdiction over other claims. Appellee Stephenson had not filed an answer in Maryland Circuit Court pursuant to the Maryland Rules, so in compliance with [Maryland Rule 2-322\(a\)\(1\) and \(3\)](#) Appellee Stephenson filed a Motion to Dismiss for lack of jurisdiction and insufficiency of service which the Circuit Court granted.

If this Court were to apply a test similar to that articulated in *Hess Corp.* in making a discretionary decision as to the effect of a federal answer on the state proceedings after balancing a number of factors, the interest of fairness should be in the forefront. The result of giving effect to the answer filed in the U.S. District Court would be a fundamentally unfair one as Appellee Stephenson would be barred from making two very viable mandatory motions without actually filing an answer pursuant to the Maryland Rules. An Appellee that lives in Nevada, that has not lived on the East Coast for over ten years, who has no contact with Maryland, who claims to have not been sufficiently served by the Appellant for the state court action, would be barred

from having his mandatory motions on personal jurisdiction and insufficiency of service even considered by this Court, again without actually filing an answer pursuant to the Maryland Rules, because that appellee answered a complaint in a different court under *18 different rules, when that different Court found that it had jurisdiction over and subsequently dismissed one of the Appellants' claims.

Appellants state that states that have addressed whether federal pleadings are valid in state court upon remand “in recent decades reveal a majority rule: the long arc of jurisprudence in other states dictates the validity of federal pleadings in actions remanded to state court.” See Appellants' Brief, pg. 14. That contention is simply untrue. There is no consensus as to a bright-line rule on whether or not federal pleadings are applicable in state court upon remand. The majority rule throughout the United States, in jurisdictions that have addressed the issue of the effect of federal pleadings in state courts upon remand pursuant to the U.S. Supreme Court's holding in *Ayres*, is that state trial courts have discretion in considering a number of factors in determining whether or not to accept federal pleadings as if filed in state court on a case by case basis. See generally, *State v. Hess Corp.*, 159 N.H. 256 (2009); See also, *Edward Hansen, Inc. v. Kearney Post Office Associates*, 166 N.J.Super. 161 (Ch.Div. 1979).

What Appellee Stephenson *actually* asks of this Court is for the Court to exercise its discretion via a similar test to that described above as employed by the New Hampshire Court. In applying a discretionary test, Appellee Stephenson requests that this Court consider the above-stated fundamental fairness concerns in light of concerns over judicial efficiency and economy and find that Appellee Stephenson's answer and amended answer in the U.S. District Court do not have an effect in the Maryland Circuit Court.

*19 Appellants go on to cite more cases from other jurisdictions that accepted pleadings filed in Federal court. Appellants contend that the Maryland state courts should follow this alleged “majority rule.” (App. Brief 14). However, Appellants fail to cite the many cases that show that state courts have refused to accept Federal court pleadings upon remand to state court.

The court in *Tracy Loan & Trust Co. v. Mutual Life Ins. Co.*, in discussing the rule in *Ayres v. Wisrall* discussed *supra*, opined that the

[Ayres] rule is well supported by cases which hold that, where remand is based on want of jurisdiction on the part of the federal court, any findings or orders made by such court during the time the case was there are void and are not binding upon the state court nor upon the parties.

Tracy Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 41, 7 P.2d 279, 282 (Sup. Ct. 1932) (citing *Graves v. Corbin*, 132 U.S. 571 (U.S. 1890); *Ayres v. Wiswall*, *supra*; *Doane v. Corbin*, 44 Ill. App. 463 (Ill. App. Ct. 1892); *Floody v. Chicago St. P., M. & O. R. Co.*, 104 Minn. 132 (Minn. 1908); *Colburn v. Hill* (C.C.A.), 103 F. 340 (6th Cir. 1900); *Early v. Beecher*, 7 Lea 256 (Tenn. 1881); *Levinski v. Middlesex Banking Co.* (C.C.A.), 92 F. 449 (5th Cir. 1899). That court determined that an answer and counterclaim filed in federal court were “ineffective as pleadings, and when the cause was remanded it stood in the state court as if no pleadings amounting to the entry of a general appearance had been filed.” *Tracy Loan & Trust Co.*, 7 P.2d at 282. That court went on to reason that allowing the federal court pleadings to be held valid in state

seem[ed] to be an attempt to call on this court to review the decision of the federal court in remanding the cause. This we may not do. Whatever reasons the federal court may have had for making its order remanding the *20 cause, such decisions by the federal court is final and conclusive and is not subject to review in this court.”

Id. at 284.

The court in *Citizens Light, Power & Tel. Co. v. Usnik* held that the answer that was filed in federal court after removal was not valid in state court upon remand. *Citizens Light, Power & Tel. Co. v. Usnik*, 26 N.M. 494 (Sup. Ct. 1921). The New York state court failed to hold service in Federal court served under the Federal Rules of Civil Procedure on a third-party defendant valid.

Pickford v. Kravetz, 206 Misc. 539 (Sup. Ct. 2002). In that case, the court held that “courts of this state would not recognize jurisdiction over a defendant upon whom process was served in a less direct way than our statute provides merely because the method used was proper in another forum which admittedly did not have jurisdiction and hence could not rightfully prescribe the method.” *Id.* at 540-41.

In *Levine v. Lacey*, the State court refused to give effect to Federal court pleadings on remand to State court. *Levine v. Lacey*, 204 Va. 297, 298 (Sup. Ct. 1963). In that case, Defendant was served with a motion for default and failed to timely respond within twenty-one (21) days as required under the Virginia Rules. *Id.* Defendant then removed the case to the United States District Court for the Eastern District of Virginia where he filed his answer and counter claim and Plaintiff filed an answer to the counter claim. *Id.* The answer and counterclaim were filed with the State court. *Id.* The case was then remanded to state court several months later. *Id.* at 299. Upon remand, the State court entered a judgment by default against the Defendant finding that Defendant never *21 responded or requested an extension to respond to the motion. *Id.* Defendant argued that his answer and counterclaim should be held valid in state court but the state court refused to acknowledge whether these documents were valid in state court as they were filed outside the twenty-one (21) day window allowed under the State rules. *Id.* Defendants then argued that Plaintiff's reply to Defendant's counterclaim, filed in Federal court, should be held valid in State court but the State court stated that the “[answer] was not filed in the State court at any time, so far as appears from this record, and was of no effect with respect to the State court proceedings.” *Id.* at 300.

Appellants cite *Alvin Banks v. Allstate Indem. Co.* stating that “there have been no cases since 1948 in which *Tracy Loan or Citizens' Light* have been followed.” *Alvin Banks v. Allstate Indem. Co.*, 143 Ohio App. 3d 97, 99-100 (Ohio Ct. App., Summit County 2001). As discussed supra, Appellants' contention that since 1948 states have begun to recognize Federal pleadings in State court is invalid as opinions more recent than 1948 have demonstrated.

Therefore, because Appellant failed to follow the Maryland Rules when they served Appellee Stephenson and did not place Appellee Stephenson on proper notice in accordance with the Fourteenth Amendment, Federal pleadings should not be valid in the Circuit Court for St. Mary's County, Maryland upon remand.

C. Appellee Stephenson Timely Challenged Jurisdiction And Process In Maryland State Court Because He Was Never Properly Served With Maryland Summons And Never Filed An Answer In State Court.

Appellants filed their Complaint in the Circuit Court for St. Mary's County, Maryland under the Maryland Rules. As discussed supra, Appellee Stephenson was not *22 properly served; therefore, did not answer. It was not until Appellees Todd and Phillip Parriott removed the case to Federal Court that Appellee Stephenson then, and only then, filed his answer and amended answer to the Federal court complaint in Federal court. Appellants chose to initially file their claim in State Court, inconvenient to appellees located in another state, but now argue that Federal Rules of Civil Procedure should apply to State court proceedings on remand as it is now to their benefit. It is a well-known fact that opinions of other state courts and federal courts are merely persuasive and not legally binding on Maryland state courts, just as proceedings under other state courts and federal courts should not be binding. Appellee Stephenson's answer in Federal Court is only applicable to the Federal Court proceeding as that Court had jurisdiction based on a RICO claim that was subsequently dismissed. Once this claim was dismissed, the case was remanded to State court where state law and process governs.

Appellee Stephenson did not waive his right to challenge jurisdiction and process because he was never properly served and never filed an answer in Maryland state court, therefore his motion to dismiss was timely.

II. APPELLANTS' APPEAL IS PREMATURE AS A FINAL JUDGMENT HAS NOT BEEN ENTERED AGAINST APPELLEE TODD PARRIOTT, APPELLEE PHILLIP PARRIOTT, APPELLEE KERRY STEPHENSON, DEFENDANT DESERT CAPITAL REIT, AND UNSERVED DEFENDANTS.

Appellants' appeal is wholly premature as a final judgment has not been rendered in the Circuit Court for St. Mary's County, Maryland against any named parties to this suit.

***23** “The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law.” [Md. Code, Courts and Judicial Proceedings, § 12-301](#). [Maryland Rule 2-602\(a\)\(1\)](#) provides that

An order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action is not a final judgment.” [Md. Rule 2-602\(a\)\(1\)](#).

Md. Rule 6-602(a)(1).

On July 31, 2013, the Honorable David W. Densford granted Appellee Todd Parriott's Motion to Dismiss for Lack of Personal Jurisdiction, Appellee Phillip Parriott's Motion to Dismiss for Lack of Personal Jurisdiction, and Appellee Kerry Stephenson's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process. (E523-28). The Circuit Court also held that Defendant Nicholas Andrews, Defendant N. Andrews LLC, and Defendant Sean Zausner were not properly served, pursuant to [Maryland Rule 2-121](#), with a complaint and summons. Appellants were not able to obtain service of process of Defendant David Zausner and Defendant David Feingold. On October 24, 2011, Defendant Desert Capital REIT, Inc. filed a Notice of Automatic Stay issued in re: Desert Capital REIT, Inc., in the United States Bankruptcy Court for the District of Nevada, Case No. 11-16624-LBR. This Notice has not been lifted to date. On August 30, 2013, Appellants filed a Notice of Appeal to the Orders granting dismissals of Appellee Todd Parriott, Appellee Phillip Parriott and Appellee ***24** Kerry Stephenson from this matter. Consequently, Appellants jumped the gun in filing this appeal as no final judgment has been entered as to any of the defendants in this matter.

A. There Is A “Just Reason For Delay” In Appellants Seeking To Expedite Their Appeal Against Appellee Parriotts And Appellee Stephenson.

Appellants argued in their Motion for Entry of Final Judgment that a final judgment should be entered against Appellee Todd Parriott, Appellee Phillip Parriott, and Appellee Kerry Stephenson pursuant to [Maryland Rule 2-602\(b\)](#) because there is “no just reason for delay.”

[Rule 2-602\(b\)](#). Judgments not disposing of entire action.

(b)When allowed. If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment: (1) as to one or more but fewer than all of the claims or parties

[Md. Rule 2-602\(b\)](#). Appellants argued that there is no just reason for delay because they are “**elderly**” and “eager to proceed with the appeal against the three [appellees].” See Appellants' Motion for Entry of Final Judgment, pg. 2. Appellants assume that if Appellants did obtain service over said un-served Defendants, it would prove futile because the Circuit Court would likely dismiss these Defendants on grounds of lack of personal jurisdiction because un-served Defendants, like served Defendants, are out-of-state. Since the court would most likely dismiss said Defendants, appellants surmise that it would be too “difficult and costly” to obtain service on Defendants not properly served and Defendants not served at all in order to prosecute their appeal. See Appellants' Motion for Entry of Final Judgment, pg. 3.

***25** Maryland courts have previously held that factors to be considered in determining whether “no just cause for delay” exists, for purposes of certification of order as final appealable judgment: whether delay of appeal would work some harsh impact, including economic impact, on litigant; whether there is danger that same issues will be considered in subsequent appeals; whether disposition of remaining claims might moot need for immediate appeal; whether entertaining immediate appeal would

require appellate court to determine questions still before trial court.” This rule provides limited discretion to the trial judge. *Romano & Mitchell, Chartered v. LaPointe*, 146 Md. App. 440, 449 (2002). It is a “limited and tightly circumscribed exception” to subsection (a) of this Rule. *LaPointe*, 146 Md. App. at 449 (quoting *Tharp v. Disabled American Veterans Dep’t of Maryland, Inc.*, 121 Md.App. 548, 553 (1998)). The policy under Rule 2-602 is to disfavor piecemeal appeals and appellate courts will examine such an appeal with tight scrutiny. *LaPointe*, 146 Md. App. at 450. The Court of Appeals determined that piecemeal appeals should be balanced against the exigency of the particular case and only be allowed in “very infrequent harsh cases.” *Id.* (citing *Diener Enterprises, Inc. v. Miller, et al.*, 266 Md. 551, 556 (1972)).

Appellants show no evidence that delaying an appeal would bestow a harsh impact upon them. This is especially true when the Appellants are the primary reason for the delay. Appellants’ statement that they are “elderly” and “eager to proceed” is not a legally sound argument that provides a basis for a “harsh impact.”

Appellants argue that a final judgment should be entered against served Appellees because expending time and money to attempt service of un-served Defendants would be *26 futile. Appellants chose to sue nine (9) named Defendants in an attempt to recover in one form or another. Appellants were aware that the threshold requirements in instituting a lawsuit are sometimes met with roadblocks. Appellants’ strategic mishap should not allow them to pick and choose who to serve and who not to serve when it is to their benefit. Appellants have chosen not to serve these Defendants because they believe service would place Appellants in a difficult financial position. Such a defense is totally without merit because Appellants have sued Appellees for millions of dollars. The simple answer to this issue is that Appellants chose to serve only some Defendants and they cannot now complain it is difficult to serve all Defendants, as this would result in a piecemeal appeal.

Appellants have failed to demonstrate that a harsh impact would be bestowed upon them and therefore pursuant to Md. Rule 2-602(b) the Court cannot conclude there is “no just reason for delay.”

B. Pursuant To Maryland Law, The Maryland Court Of Special Appeals Does Not Have Jurisdiction To Hear An Appeal When Claims Remain Against Named Defendants Who Have Been Served.

Even if it is determined that lack of a final judgment against unserved Defendants would not preclude Appellants from proceeding on their appeal, there remains claims against Defendant Desert Capital REIT, Inc. who was served.

Appellants, by their very argument as to unserved Defendants, drive this point home in quoting the rule of law in *Burns v. Scottish Development Co. Inc.*

The record in this case contains no Rule 2-602(b) certification from the circuit court. Nevertheless, the Court of Appeals has previously held that Rule 2-602 will not deprive an appellate court of jurisdiction where a final *27 judgment has been rendered but claims remain against *defendants who were not served*.

Burns v. Scottish Development Co. Inc., 141 Md. App. 679, 690 (2001) (emphasis added).

Defendant Desert Capital REIT was served with a summons and complaint but never answered due to an Automatic Stay in the United States Bankruptcy Court for the District of Nevada, Case No. 11-16624-LBR. Pursuant to USCS § 362(a)(1) “...a petition filed...operates as a stay, applicable to all entities, of the...continuation...of process...of a judicial...action...to recover a claim against the debtor that arose before the commencement of the case under this title.” 11 USCS § 362(a)(1). Defendant Desert Capital REIT, Inc. filed a Notice of Automatic Stay on October 24, 2011. Consequently, Appellants were prohibited by law from pursuing further action against Defendant Desert Capital REIT, Inc. because an Automatic Stay is in place. This stay prohibits a Final Judgment from being brought against Defendant Desert Capital REIT, Inc. and, consequently, all other served and unserved Defendants in this matter. Therefore, as Defendant Desert Capital REIT was a served Defendant and claims

remain against them, Appellants aforementioned arguments are without merit and the rule of law discussed supra cannot confer jurisdiction on this Court to hear this appeal.

Therefore, because a final judgment was not and should not be entered against Appellee Todd Parriott, Appellee Phillip Parriott, Appellee Kerry Stephenson, and any other named Defendant, served and unserved, in the Circuit Court for St. Mary's County, *28 Maryland, Appellants' appeal to the Maryland Court of Special Appeals is premature and would result in a piecemeal appeal.

III. EVEN IF THE CIRCUIT COURT FOUND SERVICE OF PROCESS ON APPELLEE STEPHENSON PROPER AND THAT FEDERAL COURT PLEADINGS ARE VALID IN STATE COURT UPON REMAND, MARYLAND STATE COURTS LACK PERSONAL JURISDICTION OVER APPELLEE STEPHENSON.

On December 12, 2012, Appellee Stephenson filed a Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process and a Memorandum in support of said Motion. (E194). On May 23, 2013, Appellee Stephenson filed a Supplemental Memorandum in Support of Appellee Stephenson's Motion to Dismiss. (E510). On July 31, 2013, Judge Densford, Circuit Court for St. Mary's County, Maryland, granted Appellee Stephenson's Motion but only addressed the issues of insufficiency of process and the effect of Federal pleadings in State court upon remand. (E528). Appellee Stephenson contends that even if Appellants' service had been proper and State court had accepted Appellee Stephenson's answer in Federal court, this Court would still not have jurisdiction over Appellee Stephenson as indicated in his Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Supplemental Memorandum in Support of Motion to Dismiss. (See E194, E510).

***29 CONCLUSION**

For the foregoing reasons, Appellee Stephenson requests that the Court of Special Appeals deny Appellants' appeal from the Circuit Court for St. Mary's County, Maryland granting Appellee Stephenson's Motion to Dismiss.

Appendix not available.